

No. 76-68

Supreme Court, U. S.
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MICHAEL RODAK, JR., JR.

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAYMOND LEDFORD AND MATILDA LEDFORD, PETITIONERS

v.

UNITED STATES OF AMERICA

***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT***

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

**ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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The question presented in this federal income tax case is whether the district court properly dismissed petitioners' refund suit for lack of jurisdiction because petitioners had previously filed a petition in the Tax Court seeking a redetermination of the deficiencies at issue.

The relevant facts may be summarized as follows: The Commissioner of Internal Revenue issued notices of deficiencies to petitioners with respect to their taxable years 1965, 1966, and 1967, and petitioners thereafter filed a timely petition for redetermination in the Tax Court. Because petitioners refused to comply with the order of the Tax Court to produce their books and records, the Tax Court dismissed their petition for failure to prosecute their action, and entered decisions

against them in the amounts of the deficiencies¹ (Pet. App. A-1 to A-2; I-R. 52, 73-74).² The court of appeals affirmed the dismissals, characterizing petitioners' actions in the Tax Court as "contumacious conduct that can only be characterized as defiant," *Ledford v. Commissioner*, C.A. 9, No. 71-1783, decided May 24, 1973 (I-R. 52), and this Court denied certiorari (415 U.S. 902).

Petitioners paid the deficiencies and commenced this refund suit in the United States District Court for the Northern District of California (Pet. App. A-2). The district court dismissed the suit for lack of subject matter jurisdiction (Pet. App. B-1 to B-3), and the court of appeals affirmed in an unpublished memorandum (Pet. App. A-1 to A-2).

Section 6512(a) of the Internal Revenue Code of 1954 provides that "[i]f the Secretary or his delegate has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income * * * taxes) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), * * * no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court * * *," with three exceptions not relevant here. Pursuant to this statute, the filing of a Tax Court petition confers exclusive jurisdiction on that court to determine all issues relating to the taxable years included in the notice of deficiency. *United States v. Wolf*, 238 F. 2d 447 (C.A. 9).

¹See Section 7459(d) of the Internal Revenue Code of 1954 (26 U.S.C.).

²"I-R." refers to the volume of the record in the court of appeals containing the clerk's record.

The rule of Section 6512(a) is applicable even where, as here, the petition is dismissed for lack of prosecution (*Fiorentino v. United States*, 226 F. 2d 619 (C.A. 3); *Monjar v. Higgins*, 132 F. 2d 990 (C.A. 2)), or if the taxpayer dismisses the petition on his own motion (S. Rep. No. 52, 69th Cong., 1st Sess. 25-26 (1926)). Thus, once a taxpayer files a petition with the Tax Court, he is barred from bringing a refund suit for the same year in a district court or the Court of Claims. Since petitioners had previously filed a petition in the Tax Court seeking a redetermination of the deficiencies for 1965, 1966, and 1967, the district court properly dismissed their refund suit for these years on the authority of Section 6512(a).

Contrary to petitioners' argument (Pet. 9), the dismissal of their refund suit is not a denial of due process. Due process does not require an actual hearing, but only "the opportunity to be heard." *Armstrong v. Manzo*, 380 U.S. 545, 552. As the court of appeals noted (Pet. App. A-2), petitioners were accorded an opportunity to litigate the merits of their claim in the Tax Court, but they forfeited that opportunity by their refusal to prosecute their case.³ It is not a denial of due process to dismiss the suit of a party who wrongfully refuses to produce documents in accordance with a lawful court order. See, e.g., *National Hockey League v. Metropolitan Hockey Club, Inc.*, No. 75-1558, decided June 30, 1976; *Societe Internationale v. Rogers*, 357 U.S. 197.

³While petitioners suggest (Pet. 9) that the Tax Court's dismissal of their petitions in their earlier cases was improper, relying (Pet. 11-12) upon the unpublished opinion in *Haun v. Commissioner*, C.A. 9, No. 74-2551, decided December 23, 1975, that question has been resolved against them in the earlier litigation.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.